

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 08-01
(April 30, 2008)

Political Activities of Judicial Candidates

Issues

1. May a candidate for judicial office publicly announce his or her views on a “number of disputed legal and political issues?”

Answer: Yes, provided the public comments conform to the standards of Canon 5B(1)(d)(i).

2. If a judicial candidate publicly expresses his or her views on legal and political issues, must the candidate, after taking the bench, disqualify himself or herself from hearing cases that involve the same issues on which he or she had commented?

Answer: It would depend on a number of factors and circumstances.

3. May a judicial candidate endorse other candidates for elective office; and may the candidate publish third-party endorsements for his or her own campaign?

Answer: The candidate may not endorse other candidates; but, the candidate may publish third-party endorsements.

4. May a judicial candidate personally solicit and receive campaign contributions?

Answer: No.

5. May a judicial candidate make contributions to political organizations, including his or her own campaign committee?

Answer: Yes, provided the contributions conform to the standards of Canon 5A(1)(c).

6. May a judicial candidate publicize his or her political party affiliation; publicly associate with county and state political party organizations; speak and solicit support at political party events and functions; use party telephone banks and volunteers to solicit donations and support?

Answer: Yes, with some limitations.

7. May a judicial candidate “encourage [his or her spouse] and children in their political activities”?

Answer: This question is too vague and nonspecific to answer in any meaningful way.

Advisory Opinion 08-01

Facts

A candidate for judicial office has submitted a list of political activities he would like to engage in, and is seeking guidance on which, if any, are prohibited by the Arizona Code of Judicial Conduct, and answers to related questions.

Discussion

Issue 1

May a judicial candidate publicly announce his or her views on a “number of disputed legal and political issues?”

Although a similar issue was addressed in Advisory Opinion 06-05, this question appears to be broader in scope than the inquiry made in that opinion. The answer, however, remains the same. As stated in Opinion 06-05, a judicial candidate may publicly discuss his or her personal opinions on any subject under Canon 5A(2) as well as Canon 5B(1)(d)(i), because a candidate may express views on any disputed issue. *See Republican Party v. White*, 536 U.S. 765 (2002) (holding that the First Amendment permits judicial candidates to inform the electorate by expressing the candidates’ views on disputed political or legal issues). However, if a candidate chooses to publicly express personal opinions on controversial issues, Canon 5B(1)(d)(i) states: “[a] candidate . . . shall not: . . . with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.” The commentary to this canon cautions that the candidate “should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her personal views.” Canon 5B(1)(a) also requires candidates to “act in a manner consistent with the impartiality, integrity and independence of the judiciary.” The candidate should consider Canon 5B(1)(a) when formulating such public statements.

The candidate also specifically inquires about the application of Canon 5A(1)(b), which prohibits judicial candidates from making “speeches for a political organization or candidate or publicly endors[ing] a candidate for public office.” This provision is clear on its face and in Advisory Opinion 96-09, this committee pointed out, “the code does not permit a judge to act as a spokesperson and advocate for others.” *White* allows certain activities when a judicial candidate is conducting his or her own campaign for office, but does not otherwise address or relax restrictions on campaigning for other political candidates. And it is difficult to see how endorsing or promoting a candidate for another elective office would inform the electorate of the endorsing candidate’s qualifications for judicial office. *White*, 536 U.S. 765.

Issue 2

If a judicial candidate publicly expresses his or her views on legal and political issues, must the candidate, after taking the bench, disqualify himself or herself from hearing cases that involve the same issues on which he or she had commented?

Advisory Opinion 08-01

Should a candidate choose to make public statements about issues that later come before the court, the candidate, after taking the bench, may be required to disqualify himself or herself from hearing cases involving those issues. Canon 3E(1) requires a judge “to disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Subsection (e) of that canon specifies that disqualification may be required when a candidate or judge “has made a public statement that commits, or appears to commit, the judge with respect to: (i) an issue in the proceedings; or (ii) the controversy in the proceedings.”

The need for disqualification is generally not determined in the abstract but may arise in the context of a specific case. The question whether a judge should remove himself or herself must be considered upon a variety of facts unique to a specific situation, including but not limited to: the nature of the statements previously made; the context of the remarks and any qualifying statements; the issue in the case; the parties in the case; and the parties’ potential willingness to agree that the judge may nevertheless participate, as provided in Canon 3F. For example, if a judge has made statements indicating he or she is “pro-choice,” no question of disqualification would arise unless and until a case involving reproductive rights came before the judge. The decision whether to recuse would then require consideration of the judge’s previous statements, the extent to which the judge’s remarks appear to commit the judge to a position, and any statements the judge may have made indicating he or she intended to follow the law regardless of personal beliefs. It is important to note that the commentary to Canon 3E(1) states that the judge “should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”

Issue 3

May a judicial candidate endorse other candidates for elective office; and, may the candidate publish third-party endorsements for his or her own campaign?

As noted earlier, Canon 5A(1)(b) prohibits a judge or candidate from making “speeches for a political organization or candidate or publicly endors[ing] a candidate for public office.” And Canon 5A(1)(d) prohibits a candidate from actively participating in “any political campaign other than his or her own election, reelection or retention in office.” In Advisory Opinion 96-08, this committee affirmed that:

Judges may not participate in campaigns for or against political candidates, even those who take positions affecting the administration of justice. Canon 5A(1) of the Code of Judicial Conduct prohibits judges from publicly endorsing a candidate, making speeches for a political organization or candidate, fund-raising for a political organization or candidate, or actively taking part in any political campaign other than their own elections.

See also Opinion 96-09 (“the code does not permit a judge to act as a spokesperson and advocate for others”). The commentary to Canon 5A makes clear that a candidate may

Advisory Opinion 08-01

“privately express” his or her views on judicial candidates or other candidates for public office. Only public endorsements by the candidate are prohibited.

On the other hand, Canon 5B(3) allows incumbent judges to “obtain publicly stated support” during a campaign, although, perhaps as an oversight, this provision does not mention candidates. Because Canon 5B(3) specifically states incumbent judges may campaign, obtain public support and raise campaign funds, and Canon 5C generally applies the provisions of Canon 5 “to all incumbent judges and judicial candidates,” it is both reasonable and logical to apply the same standard to judicial candidates when it comes to endorsements. Thus, a judicial candidate may also obtain public support or endorsements during the campaign. Advisory Opinion 96-12, however, points out some limitations on how endorsements may be used in a campaign, based on Canons 1 and 5B(1)(a), requiring that any public endorsement not cast doubt on the impartiality and independence of the candidate. It is notable that the new Model Code of Judicial Conduct, at this time not yet adopted in Arizona, prohibits all endorsements by political organizations. Canon 4, Rule 4.1(A)(7).

Issue 4

May a judicial candidate personally solicit and receive campaign contributions?

Canon 5B(2) specifically prohibits a judicial candidate from “personally soliciting campaign contributions” and directs candidates to “refer potential contributors to the candidate’s campaign committee.” The canon is clear on its face and no further explication or discussion is needed.

Issue 5

May a judicial candidate make contributions to political organizations, including his or her own campaign committee?

Canon 5A(1)(c) prohibits a judicial candidate from contributing to “a political party or organization . . . in excess of a combined total of Two Hundred Fifty Dollars per year.” A candidate may make contributions that do not exceed this limit. The canons do not address and therefore do not limit personal contributions made by a candidate to his or her own campaign. Canon 5A(2), however, directs all judicial candidates to “comply with the Arizona statutes relating to the financial aspects of the candidacy.” *See* A.R.S. §§ 16-901 through 16-925.

Issue 6

May a judicial candidate publicize his or her political party affiliation; publicly associate with county and state party organizations; speak and solicit support at party events and functions; use party telephone banks and volunteers to solicit donations and support?

A judicial candidate is not prohibited from announcing a party affiliation during the campaign, *see* Advisory Opinion 95-07, but the Arizona Constitution prohibits placing a party affiliation on the ballot. Ariz. Const. art. 6.1, § 12. A candidate may associate with

Advisory Opinion 08-01

local and state party organizations, provided the candidate complies with Canons 5A(1)(b) and 5A(2), which state that a candidate may not speak on behalf of the party organization itself, Canon 5A(1)(b), but may speak at a party event “on his or her own behalf,” Canon 5A(2). As noted above, Canon 5A(1)(d) prohibits a candidate from actively participating in “any political campaign other than his or her own election, reelection or retention in office.”

Although the canons do not prohibit a candidate from using a political party’s telephone banks or volunteers during the campaign, we note the campaign finance statutes may require disclosure of such support. *See, e.g.*, A.R.S. § 16-905, Op. Atty. Gen. No. I88-020 (“If a political party directly or indirectly gives money or things of value to a candidate or campaign committee under the control of the candidate, the contribution is subject to the limitations of [§ 16-905].”

Issue 7

May a judicial candidate “encourage [his or her spouse] and children in their political activities”?

Because the requesting candidate does not specify what political activities his spouse and children engage in, or whether these activities are in support of his campaign or other unrelated campaigns, the question is too vague and nonspecific for an answer that would not require speculation. Generally, the spouse and children of a judicial candidate are not prohibited from engaging in political activities. Canon 5B(1)(a) requires a candidate to “encourage members of the candidate’s family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate.” The commentary to this canon states that “family members are free to participate in other political activity,” reinforcing the language of the canon as applying only to the family’s support of the candidate’s campaign. Advisory Opinion 03-05 lists a number of specific political activities and the limitations, when applicable, placed on a candidate’s family.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 1, 3E(1), 3F, 5A(1)(b), 5A(1)(c), 5A(1)(d), 5A(2), 5A(5), 5B(1)(a), 5B(1)(d)(i), 5B(3), 5C (2004).

Other References

Arizona Constitution, Article 6.1, § 12.

Arizona Revised Statutes §§ 16-901 through 16-925.

Arizona Judicial Ethics Advisory Committee, Opinions 95-07 (April 19, 1995), 96-08 (August 15, 1996), 96-09 (August 15, 1996), 96-12 (October 4, 1996), 03-05 (October 30, 2003), 06-05 (October 11, 2006).

Arizona Attorney General Opinion No. I88-020.

ABA Model Code of Judicial Conduct (2007), Canon 4, Rule 4.1(A)(7).

Republican Party v. White, 536 U.S. 765 (2002).